IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 5007 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HARIKRUPA SHOPPING COMPLEX

Versus

SHAILESHKUMAR M VASAVA

Appearance:

MR VIJAY H PATEL for Petitioner

MR SHAKEEL A QURESHI for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 02/05/2001

C A V JUDGEMENT

This is an appeal filed under section 96 of the Civil Procedure Code, 1908, challenging the judgment and decree dated 29.12.1995 passed in Special Civil Suit No.156/90 under which the learned trial Judge decreed the suit of the respondent and directed the appellant to execute a sale deed of a shop bearing No.12 in Shri Harikrupa Shopping Complex after receiving Rs.20,000/from

the respondent. The appellant has further been directed to hand over possession of the said shop to the respondent within one month from the date of the order failing which the respondent is held to be entitled to execute sale deed and take possession thereof as per legal process. The facts of the case may be briefly stated as follows:

2. The respondent herein instituted the aforesaid Special Civil Suit being Special Civil Suit No.156/90 against the present appellant for specific performance of an agreement for the purchase of shop no.12 situated in Harikrupa Shopping Complex at Bharuch. The respondent contended before the trial court. That there was an oral agreement for the purchase of the said shop with the appellant in a sum of Rs.60,000/-. a total amount of Rs.40,000/- was paid to the appellant by the respondent in two instalments of equal amount. That the said shop was agreed to be purchased by the respondent in a sum of Rs.60,000/- and since the respondent had already paid an amount of Rs.40,000/-, he was required to pay an amount of Rs.20,000/- to the appellant and on such payment, the appellant was required to execute sale deed in favour of the respondent. The respondent also contended before the trial court that the appellant had to complete the construction of the shop within one month from the date of the said oral agreement. However, the appellant did not complete the construction work within such time and, therefore, the respondent could not pay the remaining amount of Rs.20,000/- to the appellant and could not get the sale deed and possession of the said property.

3. The respondent also contended before the trial court that in view of the aforesaid facts-situation, the appellant issued a notice to the respondent on 29.8.1989 requiring the respondent to pay the remaining amount and get the sale deed and possession of the shop in question. That the respondent sent a reply to the said notice of the appellant on 6.9.1989 and made it clear that he had already paid an amount of Rs.40,000/- out of the total amount of Rs.60,000/-. That the appellant had not fully constructed the said shop and, therefore, the loss of interest suffered by the respondent was required to be compensated by the appellant. That therefore, the said amount of Rs.9,600/- may be deducted and the respondent was prepared to pay a balance of Rs.10,400/-. That therefore, the appellant should accept the said amount and then should execute the sale deed and hand over possession of the said shop. This notice was not replied to by the appellant and therefore, the respondent instituted the aforesaid Civil Suit for specific

performance of the said agreement.

4. The appellant was duly served and hence submitted written statement before the trial court at Exh.25. There the appellant contended inter-alia, that it was not true that the shop was agreed to be sold to the respondent in a sum of Rs.60,000/- but the appellant contended that the contract was struck through a broker Chandulal Tribhuvandas and it was agreed upon between the parties in presence of the said broker that the respondent should pay Rs.700/- per sq. ft. That the shop has occupied a space in a measurement of 16' x 10', therefore, the total area is 160 sq.ft. That therefore, the respondent had required to pay a consideration of Rs.1,12,000/-. That out of that amount Rs.40,000/- were paid and, therefore, respondent no.1 to pay balance to the appellant. But the appellant had no money. Therefore, he had not paid the said amount. That the appellant still is ready and willing to part with the said property if the balance is paid. She, therefore, claims that the respondent was not entitled to any decree and hence the suit be dismissed with costs.

5. In the aforesaid set of pleadings, the learned trial Judge framed necessary issues at Exh.37. On appreciation of evidence before the trial court, the learned Judge found that the respondent had proved that the appellant had entered into an agreement to sell the suit shop to him in a sum of Rs.60,000/-. The trial court also found that the respondent had proved that he was ready and willing to perform this part of the contract. The trial court also found that the appellant had failed to prove that the suit was bad for non-joinder of necessary parties. On the aforesaid set of findings, the trial court denied the suit of the respondent as aforesaid.

6. Feeling aggrieved by the said judgment and decree of the trial court, the appellant has preferred this First Appeal under section 96 of the Civil Procedure Code. It has been mainly contended here that the trial court has committed serious error in holding that the suit shop was agreed to be sold and purchased in a sum of Rs.60,000/-. That the trial court has erred in holding that there was no contract for sale and purchase of the said shop in a sum of Rs.1,12,000/-. That the trial court has erred in not relying upon the evidence of the broker. That on the whole, the judgment and decree of the trial court are illegal, erroneous and deserve to be set aside. That therefore, the present appeal be allowed and the judgment and decree of the trial court be set

aside and the suit be ordered to be dismissed with costs all throughout.

7. On receiving the appeal, it was admitted and notice was issued to the other side. Mr Shakeel Kureshi, learned Advocate appears on behalf of the respondent. I have heard the learned Advocates for the parties and perused the papers. In fact, learned Advocate for the appellant has taken me through the judgment of the trial court and through the relevant portions of the evidence of the parties and their witnesses.

8. Admittedly, there was an agreement for the sale and purchase of the shop bearing Shop No.12 in Harikrupa Shopping Complex situated in Bharuch. There is absolutely no dispute between the parties about the same. However, the dispute is with respect to the consideration. According to the case of the respondent, he had agreed to purchase the said shop in a sum of Rs.60,000/-. On the other hand, the appellant has come out with a case that the contract was for a sum of Rs. 1,12,000/- on the strength that the total area of the shop is 160 sq.ft. and as per the contract, the sale was to be effected at Rs.700/- per sq.ft. and, therefore, the total consideration would come to Rs.1,12,000/-. Therefore, it is required to be considered as to whether the sale and purchase was for a consideration of Rs.1,12,000/- or not. The trial court has found as finding of fact that the contract for the purchase was in a sum of Rs.60,000/-. Therefore, the appellant has come before this court by way of this appeal.

9. We, are therefore, required to appreciate the evidence produced before the trial court. So far as the evidence is concerned, the present respondent has examined himself before the trial court at Exh.39. His evidence has been supported by the evidence on his father-Mangubhai Parshottam at Exh.46. Then there is evidence of Ravindrabhai at Exh.59. These witnesses have clearly supported the case of the respondent before the trial court. On the other hand, the appellant has tendered his evidence through Power of Attorney holder-her father Parshottam at Exh.66 and his evidence gets corroborated by the evidence of broker Chandubhai at Exh.76.

10. Now it is very clear that the conduct of the appellant is always a relevant factor in the proceedings. It would be important to note that the appellant had issued notice to the respondent on 29th August, 1989 requiring the respondent to pay the balance amount and

take possession of the shop and to obtain sale deed within seven days from the date of notice. The said notice has been produced before the court below at Exh.42. It is nowhere stated in the notice of the appellant as to what were the terms and conditions of the contract between the parties. It is not mentioned in this notice at Exh.42 that the respondent was required to pay a sum of Rs. 1,12,000/-. Since the contract was related to a shop admeasuring at 160 sq.ft. and the appellant was tobe paid Rs.700/- per sq.ft. Therefore, the main dispute between the parties before the trial court has not come out from the notice at Exh.42. Then the said notice was immediately replied to by the respondent on 6.9.1989 and the reply has been produced on record of the trial court at Exh.43. Here the respondent has made it clear that the contract was for the sale of shop was in a sum of Rs.60,000/- and out of the said consideration, a sum of Rs.40,000/- has been paid by the respondent to the appellant and he was prepared to pay the remaining amount of Rs.20,000/-.

11. Out of the said contention, the case of the respondent that he had paid Rs.40,000/- in two installments is not at all in dispute. Even the appellant has admitted the said position. However, the said case gets corroborated by production of two receipts dated 6.4.1987 and dated 15.4.1987 at Exhs. 40 and 41. Any way, the respondent had made it clear, soon after the receipt of the notice dated 6.9.1989, as to what was the contract according to him.

12. After the receipt of the said reply, the appellant remained silent for a very long time. The appellant did not come out with a case that the facts stated and the allegations made in the reply of the respondent dated 6.9.1989 at Exh.43 with respect to the terms and condition of the contract regarding consideration of the contract were not correct. The appellant also did not file any suit challenging the said contention of the respondent. The appellant had taken no action pursuant to the said reply of the respondent. This silence and conduct on the part of the appellant is very significant and important and it goes to the root of the case.

13. So far as the conduct of the respondent is concerned, the respondent immediately replied the notice of the appellant referred to hereinabove. It was followed by the aforesaid Special Civil Suit filed by the respondent in July, 1990. This shows that the respondent has shown consistent conduct in favour of the agreement

as alleged by the respondent.

14. So far as the evidence is concerned, the respondent has tendered evidence before the trial court and it has been amply supported by the evidence of his father and other witnesses referred to hereinabove. They have stood the test of cross-examination taken by the learned Advocate for the appellant. Their evidence has not been shaken to any extent and, therefore, the trial court was justified in depending upon the evidence led by the respondent including the evidence of his witnesses on the point of consideration of agreement between the parties.

15. It is a fact that the respondent has examined Sankat Hussain Gulam Mohmd. at Exh.52. This witness had purchased one shop from the said complex on 31.7.1989 under a registered sale deed in a sum of Rs.50,000/-. This witness has deposed to that effect and the said evidence has not been challenged to any extent. The evidence of the said witness gets corroborated by the registered sale deed at exh.53. The sale deed makes it clear that it was also a shop in the same complex in which shop no.12 is situated and which was agreed to be sold to the respondent. This sale deed also shows that the measurement of the shop sold to this witness by the appellant is 333 sq.ft. Therefore when the shop of a measurement of 333 sq.ft. was sold in a sum of Rs.50,000/-, then there was no reason for the present respondent to part with a huge amount of Rs.1,12,000/for the shop no.12 admeasuring 160 sq. ft. only. Even Abdul Masjid Gulam Mohmad at Exh.61 has also supported the evidence of the said purchaser-Sankat Hussain Gulam Mohmad.

16. On the other hand, the appellant did not prefer to be in the witness box but she preferred to examine her husband Parshottam as her witness at Exh.66. A suggestion was made to the respondent that the contract was effected through the broker Chandulal. Witnesses of the respondent have denied this fact. It would be interesting to note that the appellant had not clarified this position at the stage of notice. In other words, the appellant did not introduce this witness at the notice stage saying that the contract was entered into through broker Chandulal. At the stage of written statement for the first time, the name of broker Chandulal has been disclosed. Parshottam, the father and Power of Attorney holder of the appellant at Exh.66 has stated that the contract was as per the say of the appellant in the written statement. In other words,

according to his evidence, the shop was sold at Rs.700/per sq. ft. and since the total area of the shop is admeasuring 160 sq.ft., the total amount of sale would be Rs.1,12,000/-. This witness being father of the appellant and Power of Attorney holder of the appellant, naturally, was interested in supporting the case of the appellant, his daughter. If we closely scrutinise the evidence of this witness, we find that the evidence is not reliable. The witness has said that the father of the respondent and the broker Chandulal had come to him for effecting the contract. In other words, he proposed to say that Chandulal broker was acting on behalf of the respondent. On this point, we can turn to the evidence of broker Chandulal at Exh.76 who has deposed that the work regarding sale of shops in this shopping complex was entrusted to him by the appellant. This shows that he was acting as an agent of the appellant and not as am agent of the respondent. Therefore, there is some sort of contradiction between the evidence of these two witnesses.

17. Then the witness has also stated in the cross-examination that his father-in-law Sunderlal Modi was dealing with the aforesaid dealing of the shops in question. Sunderlal Modi has not been examined for the reasons not disclosed on record. Then he has also stated that it is not true that the said contract was entered through him. This evidence in examination-in-chief suggests that he was not a party to deal with the contract in question. In that case, he would not know the real terms and conditions of the contract between the parties. Again in cross-examination, the witness has said that the said shopping centre has been constructed by the partnership firm and they were also dealing with the affairs of the said firm. He is unable to say as to how the construction was made and how the materials were purchased. He simply says that he has come forward to give evidence as Power of Attorney holder of the present appellant. He also says that whatever stated by him in the cross-examination has been deposed by him as per the instructions of the appellant and he also says that he has no idea if the other shops in the said complex have been sold in a consideration of Rs. 20,000/- to 25,000/-. He has admitted at the bottom of his cross-examination that he has seen the shop No.12 in question and shutter has not been fixed and light fittings have not been installed therein. This is not in accordance with the contents of the notice of the appellant issued notice to the respondent hereinabove. There it was mentioned that the shop was ready and therefore, the respondent should pay balance and take

possession of the shop. When the shutters have not been fixed and light fittings have not been installed, the shop must have not been ready and, therefore, the evidence of this witness is contradictory to the notice issued by the appellant. Same way the notice issued by the appellant did not state the correct position.

18. Then the witness has also produced copy of written statement filed by the appellant in the suit being Special Civil Suit No.193 by Nandlal, who was partner of the appellant in the aforesaid shopping complex which has been produced at Exh.73. In the said written statement there is reference to the present shop No.12 in para 8. It is mentioned in it that the accounts have been settled and that it includes the accounts with respect to shop no.12. This means that there must be something on record in writing between the two partners of the partnership firm as to the dealings of shop no.12. This would have been a very important piece of evidence between the parties of the said partnership firm. Therefore it would have been important to ascertain terms and conditions between the parties in the present suit with respect to the contract between them regarding consideration of the sale in question. Such an important aspect and evidence has not been brought on record.

19. So far as Chandulal is concerned, he has been examined at Exh.76. Firstly, he belongs to the caste to which the appellant belongs. Secondly, his evidence has been contradicted by the evidence of the appellant's Power of Attorney holder referred to hereinabove. There is no material to show that he was really a broker engaged by either the appellant or the respondent. Moreover, there is no documentary evidence produced by him to show that he acted as broker in the present transaction. It would be relevant to consider that an amount of Rs.40,000/- has been paid by the respondent to the appellant in 1987. Therefore, if this witness was a broker, then he would have received some part of the consideration received by the appellant as his commission. Nothing of that sort has come on record. Under the aforesaid set of facts, the trial court was justified in nota relying upon the evidence of this witness. It is found here that the appellant was not in a position to prove before the trial court that the contract of sale was for a consideration of Rs.1,12,000/-. On the other hand, the respondent's evidence is very consistent. His conduct as also the evidence are amply corroborated by other witnesses and there is no reason to disbelieve the said evidence. Therefore, it may be said that the trial court has

properly appreciated the evidence of the two parties and has rightly preferred to rely upon the evidence of the respondent. The trial court has justified in not relying upon the evidence of the appellant. In that view of the matter, it has to be said that the trial court has not committed any error in decreeing the suit and in arriving at the finding that the contract of the sale of the suit shop was of Rs.60,000/-. The trial court was justified in holding that the appellant has failed in proving that the contract was of Rs.1,12,000/-. As said above, the conduct of the appellant soon after issuing the notice to the respondent was very important and relevant for arriving at the aforesaid finding. The appellant has not been able to explain her conduct subsequent to the receipt of reply of her notice for a very long time. The appellant has also failed to explain her conduct in not filing any suit challenging the said contention of the respondent in reply to the said notice referred to hereinabove. The plea as to the consideration of Rs.1,12,000/- has come out for the first time at the stage of written statement and the said plea has not been substantiated by any material on record.

20. Under the aforesaid circumstances, I am of the view that the trial court has properly appreciated the evidence before it and there is no reason to interfere with the said finding. Therefore, there is no merit in the present appeal and the same deserves to be dismissed.

21. In view of the discussion as aforesaid, this appeal is dismissed. The impugned judgment and decree of the trial court are confirmed. The appellant shall pay cost of the respondent and shall bear her own cost in the appeal.

2.05.2001 [D P Buch, J.]
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